Morrison Cohen

Client Alert | February 9, 2024

New York Appellate Court Holds That Manual Workers Do Not Have a Private Right of Action for Pay Frequency Violations

On January 17, 2024, New York's Appellate Division, Second Department held in *Grant v. Global Aircraft Dispatch, Inc.*, No. 2021–03202, 2024 WL 172900 (2d Dep't Jan 17, 2024), that New York Labor Law §§ 191 and 198 do not provide manual workers a private right of action against their employer for pay frequency violations. In *Grant*, the court noted that "neither the language nor the legislative history of Labor Law § 198 supports the plaintiff's contention that this statute expressly provides a private right of action to recover liquidated damages, prejudgment interest, and attorneys' fees for a violation of Labor Law § 191(1)(a) where, as here, the employer pays wages pursuant to a regular biweekly pay schedule."

New York Labor Law § 191(1)(a) requires that employers pay "manual workers" weekly and not later than seven calendar days after the end of the week in which wages are earned. The New York State Department of Labor ("NYSDOL") defines a "manual worker" as an individual who spends more than 25% of their working time engaged in "physical labor." The term "physical labor" has been interpreted broadly to include a variety of physical tasks performed by employees, including, but not limited to, heavy lifting, arranging inventory, cleaning, and standing for long periods of time. Whether a worker is considered a manual worker, however, is determined on a case-by-case basis depending on the worker's job duties and responsibilities. New York Labor Law § 198 provides a private right of action for an employee paid less than the wages to which they are entitled, including under § 191. The court in *Grant*, however, held that paying manual workers on a biweekly basis for all hours worked is not considered an underpayment that would trigger a private right of action under New York Labor Law § 198.

The court in *Grant* departed from a prior decision issued by the Appellate Division, First Department in September 2019, in which the First Department considered the same issue. In *Vega v CM & Assoc. Constr. Mgt., LLC*, 175 A.D.3d 1144 (1st Dep't 2019), the First Department, contrary to the holding in *Grant*, held that manual workers do have a private right of action against their employers for failure to provide paychecks on a weekly basis, reasoning that "[t]he moment that an employer fails to pay wages in compliance with section 191(1)(a), the employer pays less than what is required." Thus, even where an employee is theoretically paid in full for all hours worked on a bi-weekly basis, the court in *Vega* held that manual workers are permitted to assert claims for an "underpayment" of wages under Labor Law § 198.

Inasmuch as the inconsistent decisions in *Grant* and *Vega* have created a split between and among the courts of the New York Appellate Division, until such time as there is a ruling on the issue from the New York Court of Appeals, the state's highest court, New York trial courts will be subject to different interpretations of the law depending on their geographic location. Trial courts in the Bronx and Manhattan will be bound to follow the decision in *Vega*, whereas courts in other downstate counties will be bound by the decision in *Grant*. Trial courts within the Third and Fourth Departments may choose to follow *Grant* or *Vega*. Federal courts are not bound by either of the *Grant* or *Vega* decisions, and can choose to interpret New York Labor Law, based on how a court believes the New York Court of Appeals will ultimately decide this issue.

Employers should also note that Governor Kathy Hochul has indicated an interest in reducing employer liability for pay frequency violations by proposing an amendment to New York Labor Law § 198 to exclude the recovery of liquidated damages for a violation of § 191 where "the employee was paid in accordance with the agreed terms of employment, but not less frequently than semi-monthly." The proposed amendment was included within the New York State Executive Budget for fiscal year 2025, which was announced on January 16, 2024 and submitted to the Legislature to be reviewed and acted upon prior to April of this year. Additionally, other proposed bills appear aimed

at mitigating employer liability for pay frequency violations. For example, one bill proposes to amend New York Labor Law § 191 to permit employers to avoid civil liability if they pay employees who are manual workers no less than semi-monthly, rather than weekly. Another bill proposes to amend New York Labor Law § 198 to establish an exemption of liability for payments made within fourteen calendar days of the week in which the wages were earned. Yet, another bill aims to revise the definition of "manual worker" to those whose primary duty is to engage in physical labor, including a specific list of occupations to be developed by the Commissioner of Labor, which would potentially narrow the scope of workers classified as manual workers.

Based on the current state of the law, employers will want to remain apprised of any new pay frequency developments through both the court system and the legislative process. Employers will want to continue to review and revise their pay frequency policies and practices to remain in compliance with current law.

Key Contacts

Our Labor & Employment team is available to help employers navigate their compliance with New York pay frequency laws and other New York Labor Laws, and assist employers in managing employer-employee relations or in defending against wage and hour law claims and all other types of workplace claims.

Jeffrey P. Englander
Partner & Co-Chair
Labor & Employment

D 212.735.8720
jenglander@morrisoncohen.com

Keith A. Markel
Partner & Co-Chair
Labor & Employment

D 212.735.8736
kmarkel@morrisoncohen.com

John B. Fulfree
Partner
Labor & Employment

D 212.735.8850
jfulfree@morrisoncohen.com

Cassandra N. Branch
Associate
Labor & Employment

D 212.735.8838
cbranch@morrisoncohen.com

Alana Mildner Smolow
Associate
Labor & Employment

D 212.735.8784
amildner@morrisoncohen.com

Kayla West
Associate
Labor & Employment

D 212.735.8760
kwest@morrisoncohen.com